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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 414

JOSEPH P. MONTEROSSO, et al.,
Petitioners,

v.

GLOBE-DEMOCRAT PUBLISHING COMPANY,*
Respondent.

BRIEF

In Opposition to Certiorari.

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* Corporate name of respondent is incorrectly given by petitioners as "St. Louis Globe-Democrat Publishing Company" throughout their pleadings.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477

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SUMMARY OF ARGUMENT.

Nothing is presented for review by the petition for writ of certiorari in this case; because:

I. The "question presented" (Pet'n. p. 2) is not a federal question.

II. Whether or not a federal question was ruled by the Missouri Supreme Court, adequate independent dispositive non-federal grounds for the decision appear (a) in the

original opinion, and (b) in the opinion passing on the motion for rehearing or transfer, in which petitioners attempted for the first time to raise a federal question.

III. The application of Missouri substantive law to the issues, which is now claimed as error, was invited,—nay, demanded,—by petitioners at every stage of the Missouri litigation, and they are estopped from asserting here and now that in doing precisely what they had asked, the courts below committed error.

ARGUMENT

I

Petitioners state the question presented by their petition in the following language (Pet. Br. 2):

> "Whether a state supreme court may interpret a collective bargaining agreement in a suit by individual employees against the employer, by rejecting from consideration the intention of the parties, the context in which the agreement was negotiated and the purpose which the collective bargaining agreement is intended to serve."

Argumentative in form, and false in implication as this question no doubt is, it does not state a federal question at all.

Lacking any reference to a federal right, the question (even if it were an accurate description of what the Missouri court did) can only be answered by this court, "yes."

Even at this stage, no federal question is presented, and the petition must be denied.

II

Adequate independent non-federal grounds for the decision sought to be reviewed appear in the opinions below, and the writ should not be granted.

The principle involved is unanimous and unequivocal, and iterated in a line of Supreme Court opinions, the latest of which (as we read the reports) is Fay v. Noia, [illegible] U. S. [illegible], 83 S. Ct. 822 (1963). In this opinion the rule is stated as follows (l. c. 843):

> "It is a familiar principle that this Court will decline to review state court judgments which rest on

independent and adequate state grounds, notwithstanding the co-presence of federal grounds. [Citing authorities]. Section 25 of the Judiciary Act of 1789, c. 20, 1 Stat. 85-87, denied this Court power to base the reversal of a state court decision on any error other than such as * * * immediately respects * * * questions of validity or construction of the said [Federal] Constitution, treaties, statutes, commissions, or authorities in dispute.' * * * Murdock [v. Memphis] was a case involving state substantive grounds, but the principle is also applicable in cases involving procedural grounds."

Radio Station WOW v. Johnson, 326 U. S. 120, 128, 129, 65 S. Ct. 1475, 1480, applied the principle directly to facts legally indistinguishable from those before us in this matter, viz.:

> "Here the Nebraska Supreme Court held that the federal question had dropped out as a matter of pleading and also denied its merits.
>
> "This brings the situation clearly within the settled rule whereby this Court will not review a state court decision resting on an adequate and independent, non-federal ground even though the state court may have also summoned to its support an erroneous view of federal law." [Quoting authority]

Petitioners concede (Petition, p. 4) that they raised no federal question, either in the trial court or in the submission of their appeal to the Missouri Supreme Court. None was discussed in the initial opinion, which considered and decided all issues raised by petitioners in favor of respondent and affirmed the judgment (App. A).

The only other ruling of the Missouri court is the *per curiam* opinion on the order overruling the motion for rehearing.

So far as relevant, this opinion reads (App. A, p. 23, Petition):

> "In their motion for rehearing or to transfer to the court en banc appellants contend, for the first time, that a federal question is involved, and that this case should be governed by the federal common law or federal substantive labor law, in the interest of industrial peace. The per curiam opinion, this day filed in Ackerman v. Globe-Democrat Publishing Co., Mo. . . , 368 S. W. 2d 469, and Irwin v. Globe-Democrat Publishing Co., . . Mo. . . , 368 S. W. 2d 452, disposed of these contentions adversely to appellants.
>
> "The motion for rehearing or to transfer is overruled."

The Supreme Court of Missouri sits in two divisions. This case and the Ackerman case were decided by the Judges of Division No. 1 (App. C, 41), and the Irwin and Allen cases by those of Division No. 2 (App. C, 32, 37).

The Ackerman *per curiam* opinion (by the same division, on the same day) must have been foremost in the Court's mind in deciding the motion in this case. The Ackerman opinion categorically rules the supposed Federal question to have been raised too late (App. C, 42, 43):

> "The attempt to inject a federal question for the first time in the motion for rehearing came too late to secure a transfer to the court en banc under our practice and procedure."

. . . . . .

> "The suggestion that federal labor policy and federal substantive law governs the construction of this agreement is a new theory, introduced into this litigation for the first time on the motion for rehearing. As indicated, the case was not submitted on any such theory, either in the trial court or in this court. No

reference was made in respondents' brief on appeal to federal law, in urging us to adopt their interpretation of Article XI. Both sides treated all questions for decision as questions arising under local law, and determinable by local law. New propositions and complaints, not made in the original briefs, Ford v. Wabash Ry. Co., 318 Mo. 723, 300 S. W. 763, 778, and raised for the first time after the opinion is handed down by the Supreme Court, Phippin v. Mo. Pac. R. Co., 196 Mo. 321, 93 S. W. 410, 448, or which are clearly afterthoughts, State ex rel. Cole v. Matthews, en banc, Mo. Sup., 274 S. W. 2d 286, 292, ordinarily will not be considered on motion for rehearing."

The only discussion of the merits of appellants' asserted federal question immediately follows, commencing with these words:

"We will consider the matter, however, sufficiently to point out the following: . . ."

What the Court then points out is the apparent lack of Federal authority, cited or found, showing "that our decision is contrary to any federal decisions on this subject," and it concludes this phase of the opinion by saying (App. C, p. 44):

"Having decided this case on its merits [in the original opinion] we do not conceive it to be our function to sustain respondents' position in this case willy-nilly, lest it be summarily returned to this Court by the Supreme Court of the United States', as respondents' counsel warn on page 12 of their suggestions."

It is perfectly clear that the Missouri Supreme Court in this case, as in the simultaneous out-of-the-same-division Ackerman case, adhered to its decision of the case on the merits as it had been originally presented, and ruled the newly asserted federal question was not cognizable, because raised out of time.

In our brief in opposition to grant of certiorari in the Irwin case we have shown that the Irwin *per curiam* opinion did not decide the federal question, but merely assumed for purpose of discussion that federal substantive law was applicable. We have shown also that this opinion, like Ackerman, overruled plaintiffs' motion to transfer on the express ground that the question was raised too late (see instant petition, p. 36). Whatever view be taken of the Irwin opinion, suffice it to say that if the reference to the other *per curiam* opinions made in the Monterosso *per curiam* opinion adopts the reasoning of both cases, the decision in Monterosso is certainly based in part, at least, on adequate and independent non-federal grounds, i. e., that the assertion of the federal question came too late.

We do not see how it can be said that the decision in this case ruled a federal question at all. But if it be considered that the opinion does so, at least it must be conceded that it also ruled that the federal question was raised too late.

This is a matter of local procedure, and not of federal substantive right. WOW v. Johnson, *supra*; and since it was an independent and adequate ground of decision which cannot be reviewed on certiorari, the writ should not be granted.

III.

An examination of the plaintiffs' pleadings, arguments and submissions in the Missouri Courts reveals that they themselves sought, throughout, a determination of their rights under principles of Missouri—not federal—substantive law.

(a) Petitioners' first amended petition upon which their claims are still based is set out in the transcript of record, p. 1, et seq. An examination of that petition shows

that plaintiffs were (and still must be) asking for a determination of their rights under Missouri law, and not under federal law.

Item: Any relevant federal right must arise out of L. M. R. A., § 301 (a), 29 U. S. C., § 185 (a). The basic requisite of that statute (for constitutional reasons) is that the employment be "in an industry affecting commerce as defined in this Act." No allegation appears in the petition that this jurisdictionally requisite fact existed.

Item: Since the decision of the Supreme Court of Missouri in this case, there has been filed a complaint by petitioners' union against this respondent, now pending in the United States District Court for the Eastern District of Missouri; a certified copy of which has been filed with the Clerk of this Court.* This complaint, based on the same facts, [illegible] seeking, through the representation of the same counsel, much of the same recovery as that sought in the action now under review, clearly states plaintiffs' invocation of federal rights (Par. 1):

> "The plaintiff asserts its cause of action as a Union under contract with the Defendants within the provisions of the Labor Management Relations Act of 1947, Sec. 301 (a), 29 U. S. C. A. 185 (a)."

No analogous allegation appears anywhere in the petitioners' pleadings in the case at bar. This is a requisite, under Missouri procedure, to the application of extra-state law (Mo. Sup. Ct. Rule 3.14; Robinson v. Gaines, 331 S. W. 2d 653, 655).

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* The problems of res judicata, estoppel by judgment, splitting claims, etc., presented by this complaint, may be an illustration of the "confusion, conflicts and burdensome proceedings" foretold by Mr. Justice Black's dissent in Smith v. Evening News, 83 S. [illegible]

490.110 Mo. R. S. 1959, provides as follows:

> "Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction, or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise."

Item: It is alleged (Par. 2) that defendant is a Missouri corporation doing business in Missouri, and publishing a newspaper "in said City and State". (This would be irrelevant to a claim under § 301 (a).) Why was this allegation made?

Item: [Because] Penalties are sought under two Missouri statutes, applicable under certain circumstances to actions for the recovery of unpaid wages under Missouri substantive law, but wholly inapplicable to recovery under Section 301 (a) of L. M. R. A. The statutes are set out in the plaintiffs' first amended petition (Par. 6, Par. 7, Rec. pp. 9-10), and each statute requires Missouri residence of the defendant's business:

> (Par. 6) "The employees of the operators of all manufactories, including plate glass manufacturies, *operated within this state* shall be regularly paid," etc.
>
> (Par. 7) "Whenever any corporation *doing business in this state* shall discharge," etc.

Both the trial court (R. 29) and the Missouri Supreme Court (App. A, pp. 20-22), were required by petitioners to pass on the penalty claim, because vacation pay was held due these plaintiffs in the trial court, and defendant did not appeal.

The assertion of these penalty claims which are applicable to Missouri employees only, is wholly antithetical to

the assertion of the applicability of a body of uniform and nation-wide federal substantive law formulated under § 301 (a) L. M. R. A.

(b) The trial court's opinion is set out in the Record at p. 20, et seq. It discusses and disposes of every contention raised by petitioners in a manner unusual, and highly commendable, for trial judges in any jurisdiction. Nothing is preserved of the arguments in the trial court, except the hearsay evidence of the trial court's opinion (R. p. 26). No shred of suggestion of a federal right appears from the opinion. It is clear, even from the reference to the New Jersey decision cited by petitioners (R. p. 27) that the trial court understood that he was asked to judge the plaintiffs' claim according to rights asserted under Missouri substantive law.

(c) Petitioners' motions to amend the judgment or, alternatively, for a new trial, are set out at pages 31 and 38 of the Record. They consist of a frontal attack on the opinion as a misapplication of Missouri or general contract law, with no suggestion of a federal rule. One of the cases is cited in these words: "the Missouri case of Dodier Realty and Investment Co. v. St. Louis National Baseball Club, Inc., Supreme Court of Missouri, en banc, February, 1951." Petitioners say of this opinion (R. 34):

> "In the Dodier case the Supreme Court en banc obviously rules that there is a well defined difference in the Law of Missouri [sic] between a merger and a consolidation of corporate entities."

(d) Petitioners' oral argument in the Missouri Supreme Court is not preserved. However, petitioners concede (Pet. p. 4) that they there raised no federal question, and the two opinions of the court confirm this. A copy of their printed Statement, Brief and Argument, however, has been filed with the Clerk of this Court.

Of the three points they raised in their Missouri Supreme Court brief, only point one is of significance here because point two was rejected as not in compliance with the court's rules (App. A, p. 20), and the third point dealt with the purely local-law question of the applicability of the penalty statutes.

The discussion of point I (14-22) occupies thirteen pages of the brief, without the slightest suggestion that some other body of law than local Missouri contract law should be applied. Of the thirty-two citations of authorities it contains, twenty-six are to decisions of Missouri courts.

Thus, the petitioners invited the Missouri Supreme Court, as they had invited the Missouri trial court, to determine their rights under principles of Missouri contract law. They will not now be heard to assert that the Missouri courts committed error in doing so.

> "An appellant or plaintiff in error is estopped, or will not be permitted, to take advantage of errors for the commission of which he was responsible, or which he himself committed, caused, brought about, provoked, participated in, created, or helped to create, or contributed to, or which he has invited or induced the trial court to commit, as where the ruling or error was made at his request or suggestion, or on his urging, or where he procured the making of the ruling or the taking of the action." 5 C. J. S., App. and Error, 1501.
>
> "The rule is well settled that a party cannot successfully complain of error for which he is himself responsible or of rulings which he has invited the trial court to make." 3 Am. Jur., App. and Error, 876.

In Virginian Ry. Co. v. Mullens, 271 U. S. 220, 227, 228, 46 S. Ct. 526, 529, this court held:

> "The plaintiff also seeks to support the judgment on the theory that * * * But he is not in a position to

urge this contention here. The case stated in the complaint was distinctly in tort. There was no question of a contract obligation, nor any reference to either of the two deeds. And when the court came to charge the jury the plaintiff tendered and the court included in its charge various instructions wherein the case was treated, in keeping with the complaint, as one to recover damages for an alleged tortious creation and continuance of a nuisance. After bringing and trying the case on that theory the plaintiff cannot be permitted on this review to change to another which the defendant was not required to meet below."

CONCLUSION.

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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